U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: LIN 99 100 52693 Office: Nebraska Service Center Date: OCT 3 2000

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

Public Copy

IN BEHALF OF PETITIONER:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was dismissed by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a children's health center which seeks to employ the beneficiary as a physician for a period of three years. The director determined the petitioner had not demonstrated that the beneficiary had passed all parts of the Federation Licensing Examination (FLEX) or an equivalent examination.

On appeal, counsel argues that the beneficiary need not have passed the FLEX examination because he is licensed in the State of Michigan. In the alternative, counsel argues that the beneficiary should be given the opportunity to take the FLEX or an equivalent examination.

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(i)(b), provides in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to section 214(i)(2) of the Act, 8 U.S.C. 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Section 212(j)(2) of the Act provides in part that a graduate of a foreign medical school who is coming to perform services as a member of the medical profession may not be admitted as a member of the medical profession pursuant to section 101(a)(15)(H)(i)(b) unless he or she has passed the Federation Licensing Examination (FLEX) or an equivalent examination as determined by the Secretary of Health and Human Services. Furthermore, 8 C.F.R. 214.2(h)(4)(viii)(B)(2) provides that a petitioner seeking to have a physician who graduated from a medical school in a foreign state under section 101(a)(15)(H)(i) must establish that the beneficiary has passed the FLEX or an equivalent examination as determined by the Secretary of Health and Human Services.

On September 16, 1992, the Department of Health and Human Services published a notice in the Federal Register, Vol. 57, No. 180, which indicated that Parts I, II, and III of the National Board of Medical Examiners (NBME) certifying examinations and Steps 1, 2, and 3 of the United States Medical Licensing Examination (USMLE) were recognized as equivalent to the FLEX. The notice did not provide that combinations of these examinations are equivalent to the FLEX. Hence, combinations of these examinations may not be used to meet the statutory requirement that the alien have passed the FLEX.

The record reflects that at the time the visa petition was filed the beneficiary had not passed the FLEX or Steps 1,2 and 3 of the USMLE or Part I, II and III of the NBME. Therefore, it is concluded that the petitioner has not demonstrated that the beneficiary has met the regulatory requirements. Accordingly, the petition may not be approved.

Counsel argues that the beneficiary should be exempt from the Service requirements because he is licensed in the state of intended employment. However, there is no provision in statute or regulations which waives the passage of an appropriate examination merely because the beneficiary holds a license to practice medicine.

Counsel also argues that the beneficiary should be given the opportunity to take the USMLE. Nevertheless, pursuant to 8 C.F.R. 103.2(b)(12):

> An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed.

The petitioner did not provide evidence that the beneficiary has passed one of the aforementioned examinations and has still not provided such evidence. Accordingly, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.